No. 10,940

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KOA GORA, *Appellant,*
vs.
TERRITORY OF HAWAII, *Appellee.*

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes and Texts

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BRIEF FOR APPELLANT.

The appeal is by the defendant in a criminal action from a final judgment of the Supreme Court of the Territory of Hawaii.

STATEMENT OF JURISDICTION.

Appellant was charged in the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii, with violation of section 6253 of the Revised Laws of Hawaii, 1935, to wit, lascivious conduct, and on conviction thereof was sentenced to imprisonment for six months. (T. 52.) The said district court had jurisdiction. (Rev. Laws of Hawaii, 1935, sec. 3765.) He duly appealed to the Circuit Court for the First Judicial District of the Territory of Hawaii. (T. 52.)

The said circuit court had jurisdiction. (Rev. Laws of Hawaii, 1935, sec. 3500.) A trial *de novo* was had in the circuit court and appellant was again found guilty and the same sentence was imposed. (T. 40-43.) He prosecuted a writ of error to the Supreme Court of the Territory of Hawaii. (T. 6-7.) The said supreme court had jurisdiction. (Rev. Laws of Hawaii, 1935, sec. 3550.)

The final judgment of the Supreme Court of the Territory of Hawaii affirmed the judgment of the said circuit court (T. 39), the Constitution of the United States being involved (T. 31). Appellant duly appealed to this court. (T. 2-3.) The jurisdiction of this court to review the said final judgment of the Supreme Court of the Territory of Hawaii is therefore sustained by section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

Appellant was convicted of violating section 6253 of the Revised Laws of Hawaii, 1935. The section, as amended by the Session Laws of Hawaii, 1941, pp. 249-250, reads:

> "Any man or woman who is guilty of lewd conversation, lascivious conduct, or libidinous solicitations, shall be punished by imprisonment of not more than one year or by a fine not exceeding one thousand dollars ($1000.00), or by both such imprisonment and fine."

The accusation against appellant was framed in this language:

> "That Koa Gora, at Honolulu, City and County of Honolulu, Territory of Hawaii, on the 6th day of July, A. D. 1943, did do that which was lewd and lascivious in conduct, contrary to section 6253 of the Revised Laws of Hawaii, 1935." (T. 32.)

The evidence upon which the conviction rested may be briefly stated. On July 6, 1943, one Arthur Notikai, a Shore Patrolman with the United States Navy, went to premises in Honolulu where appellant conducted a rooming house. (T. 9-10.) His purpose was "to make an investigation of the place". (T. 10.) He gained entrance to the premises by pretending that he was looking for a room. (T. 10-11.) Appellant took him to a small building on the premises containing one room with shower and toilet. (T. 11.) While in this small building, appellant unbuttoned Notikai's pants and laid hands on his private parts. (T. 11.)

Upon such accusation and such evidence appellant faces imprisonment for six months (T. 40-43) unless this court reverses the final judgment of the Supreme Court of the Territory of Hawaii.

On the writ of error to the said Supreme Court, appellant challenged the charge made against him as repugnant to the Fifth and Sixth Amendments to the Constitution of the United States. (T. 35.) The same questions are involved on this appeal. (T. 3-5.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Appellant relies upon his assigned errors Nos. I, II, III, and IV. (T. 3-5.)

ARGUMENT OF THE CASE.

Summary of Argument.

The accusation against appellant is repugnant to the Sixth Amendment to the Constitution of the United States. The constitutional guaranty of the said amendment is that "in all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . .". Here the accusation against appellant was that he "did do that which was lewd and lascivious in conduct". This was too vague, indefinite, uncertain, and general to satisfy the constitutional guaranty of the Sixth Amendment.

The conviction of appellant is repugnant to the Fifth Amendment to the Constitution of the United States. The constitutional guaranty of the said amendment is that no person shall be deprived of liberty without due process of law. In criminal cases this means that accusation must be made in due form and under a certain and unambiguous law defining the crime. Here the accusation was not in due form. Here the appellant was convicted under a law that was uncertain and ambiguous. Here the law did not define the crime. Therefore, the constitutional guaranty of the Fifth Amendment was not satisfied. There-

fore, the judgment of the Supreme Court of the Territory of Hawaii should be reversed.

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1. THE ACCUSATION AGAINST APPELLANT IS REPUGNANT TO THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Assignment of Error No. 1. (T. 3-4.) Defendant was charged with violation of Section 6253 of the Revised Laws of Hawaii, 1935, as amended by Act 88, Session Laws of 1941, which makes a criminal offense of "lewd conversation, lascivious conduct or libidinous solicitations" without defining or otherwise specifying what acts or words constitute an offense. The charge against defendant in the trial court was merely that he had, on a day specified, done "that which was lewd and lascivious in conduct." Plaintiff in error contends that said charge was insufficient to reasonably apprise him of the nature of the charge or accusation against him, and the same was too vague, indefinite, uncertain and general to satisfy the requirements of the Constitution, particularly the Sixth Amendment thereof.

Assignment of Error No. IV. (T. 5.) That said charge failed to set forth with reasonable particularity the offense which defendant was alleged to have committed, to enable defendant to prepare his defense, and to plead his conviction in a subsequent prosecution for the same offense, and the Supreme Court therefore erred in sus-

taining the action of the trial court in putting defendant to trial thereon and in finding him guilty.

The Sixth Amendment to the Constitution of the United States is plain in its mandate: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." (U.S.C.A., Const., Amend. 1 to 12, p. 327.)

Section 6253 of the Revised Laws of Hawaii, 1935, has already been quoted. Only the portion thereof denouncing "lascivious" conduct is here applicable. The accusation made against appellant under the section was merely to the effect that on a certain day in the city of Honolulu, he "did do that which was *lewd* and lascivious in conduct". The use of the word "lewd" in the accusation may be disregarded as surplusage, for the words "lewd" and "lascivious" have the same meaning, and signify "the form of immorality which has relation to sexual impurity." (*Swearingen v. United States,* 161 U. S. 446, 16 S. Ct. 562, 563.) In substance, therefore, the broad accusation against the appellant was that on the day and at the city specified he was guilty of immoral conduct which had relation to sexual impurity. That the accusation thus framed was vague, that it was indefinite, that it was uncertain, and that it was general, cannot be doubted. Nor can it be doubted that the accusation thus framed did not inform appellant of the *nature and cause* of the accusation, for it did not inform him of specific accusers, specific accusatory circumstances,

or a specific offense coming within the general definition of "lascivious" conduct, or immoral conduct having relation to sexual impurity. At best, the form of accusation made against appellant could only cause speculation in his mind as to what conduct on his part during each and every moment of the day specified might, in the opinion of his accusers, whoever they were, be regarded as "lascivious". At best, the form of accusation made against appellant would force him to trial not knowing who his accusers were, not knowing what specific accusations were made, and not knowing what defense to prepare.

Heretofore, the constitutional guaranty extended by the Sixth Amendment to the Constitution of the United States has protected an accused against accusations of the type here involved. The general rule on the subject is stated in 27 American Jurisprudence 662-664, as follows:

> "The general rule that an indictment or information for a statutory offense is charged in the words of the statute, either literally or substantially, or in equivalent words, is without application where the statutory words do not themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the elements and ingredients necessary to constitute the offense intended to be punished. As the courts have pointed out, the words of the statute may be sufficient to describe or legally characterize the offense denounced, and yet be wholly insufficient to inform the accused of the specific offense of which he is accused, so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense,

as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all of its essential elements. In such a situation, the statutory words must be supplemented by other allegations which clearly and accurately set forth every ingredient of the offense which such precision and certainty as to leave no doubt in the minds of the accused and the court as to the exact offense intended to be charged. An information charging an offense in the words of a statute which defines an offense generally is insufficient where it alleges the offense in the language of the statute, but does not state the specific acts on which the charge is based, and is not sufficiently definite to be of any value as a bar to further prosecution."

In *Evans v. United States,* 153 U.S. 584, 14 S.Ct. 934, 936, it was said:

"Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon the plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates."

And in *Skelley v. United States,* C.C.A. Okl. 1930, 37 F. 2d 503, it was said, at page 504:

"The Fifth and Sixth Amendments of the Constitution of the United States require that the indictment inform the accused of the nature and cause of the accusation; and that purpose is two-

fold, it must be sufficiently certain as a pleading to enable the defendant to make his defense, and also sufficiently certain to enable him to plead jeopardy if he should be indicted again. * * * On the proposition that 'where a statute is general, it is not sufficient merely to follow its language in an indictment, but the indictment must allege the specific offense coming under the general description of the statute, in order that the accused may enjoy the right, secured by the Sixth Amendment' see *Boykin v. United States,* 11 F. 2d 484, 485, and cases there cited."

If appellant be accorded the constitutional guaranty extended by the Sixth Amendment to the Constitution of the United States, it must inevitably follow that the judgment of the Supreme Court of the Territory of Hawaii be reversed.

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2. THE ACCUSATION AGAINST APPELLANT IS REPUGNANT TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Assignment of Error No. II. (T. 4.) That the Supreme Court erred in affirming the action of the trial court in adjudging defendant guilty and sentencing him for violation of Section 6253, Revised Laws of Hawaii, 1935, as amended by Act 88, Session Laws of 1941, for the reason that said law is void for uncertainty and indefiniteness.

Assignment of Error No. III. (T. 4-5.) That in the trial court, the defendant was put to trial upon the following charge:

> "That Koa Gora at Honolulu, City and County of Honolulu, Territory of Hawaii, on the 6th day of July, A. D. 1943, did do that which was lewd and lascivious in conduct, contrary to Section 6253 of the Revised Laws of Hawaii 1935."
>
> That said charge wholly failed to state an offense against the laws of the Territory of Hawaii, and was too vague, indefinite, uncertain and general to satisfy the requirements of the Constitution, particularly the Sixth Amendment thereof, and the Supreme Court erred in sustaining the action of the trial court in finding defendant guilty.

The Fifth Amendment to the Constitution of the United States is also plain in its mandate: "No person shall . . . be deprived of . . . liberty . . . without due process of law." (U.S.C.A., Const., Amend. 1 to 12, p. 102.)

It is elementary that in criminal cases the constitutional guaranty of "due process of law" is not satisfied unless an accusation be made in due form under a certain and unambiguous law defining the crime. (*Simons v. United States,* C.C.A. Wash. 1941, 119 F. 2d 539, 544.) In *Lanzetta v. State of New Jersey,* 206 U.S. 451, 59 S. Ct. 618, 619, it was said:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not validate it. * * * It is the statute, not the accusation under it, that prescribes the rule

> to govern conduct and warns against transgression. * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. The applicable rule is stated in *Connally v. General Const.* Co., 268 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' ''

And in *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 41 S. Ct. 298-301, the court declared that the vagueness of a statute there considered rendered it void for repugnance to the Constitution, saying that "it leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against". This language of the lower court was also approved:

> "* * * because the law is vague, indefinite and uncertain and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of different courts and juries, which may be called upon to enforce it, and because it does not inform defendant of the nature and cause

> of the acquisition against him, I think it unconstitutionally invalid * * *"

The phrase "lascivious conduct" contained in section 6253 of the Revised Laws of Hawaii, 1935, cannot possibly survive the test of the foregoing authorities. The phrase fixes no immutable standard of guilt. The standard is left to the variant views of different courts and juries. All must speculate as to the meaning of the phrase. What may be considered as immorality relating to sexual impurity in one case may not be so considered in the next. In each case the standard is locked up until the trier of fact applies the key. The repugnancy of the phrase to the constitutional guaranty under discussion, is obvious.

It is true, of course, that the offense of "lascivious conduct" was known to the common law (4 Blackstone, Commentaries, ch. 4, p. 64), and that courts frequently resort to the common law to ascertain the meaning of a statute couched in general terms (*Martin v. United States,* 278 F. 913; *Territory v. Chee Siu,* 25 Hawaii, 814; *Territory v. Scully,* 22 Hawaii, 618; 22 Corpus Juris Secundum 69; 14 American Jurisprudence 774, 775). But resort to the common law cannot save said section 6253. At common law the offense of "lascivious conduct" had to be "openly and publicly committed" (*State v. Moore,* 31 Tenn. (1 Swan) 136; 36 Corpus Juris 1038), and so alleged in the accusation (*Delany v. People,* 10 Mich. 241).

Again, if appellant be accorded the constitutional guaranty extended by the Fifth Amendment to the

Constitution of the United States, it must inevitably follow that the judgment of the Supreme Court of the Territory of Hawaii be reversed.

CONCLUSION.

Appellant therefore respectfully submits that the judgment appealed from should be reversed.

Dated, San Francisco, California,
April 9, 1945.

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